and his counsel. *Id.* at 59a-60a. The court concluded that the petitioner and his counsel reasonably relied on the government's representations that there were no relevant documents in the Florida warehouse. *Ibid.*[1]

5. The court of appeals reversed. Pet. App. 1a-44a. The court held that, in order to establish a *Brady* violation, a defendant must show that the government "suppressed" the evidence at issue, and that petitioner had failed to make that showing. *Id.* at 17a-18a. At the outset, the court noted that petitioner had created a massive number of documents and that the government therefore faced an enormous practical difficulty in discovering and revealing all potentially relevant information. *Id.* at 19a. The court then addressed three additional considerations.

First, the court emphasized that petitioner knew about the existence of the warehouse documents. Pet. App. 21a. As the court explained, they were petitioner's own documents, he was aware they were housed in Florida, and he had already viewed a massive number of documents from the warehouse, alerting him to what he could expect to find in the remainder of the documents. *Ibid.*

Second, the court found that the government repeatedly made the warehouse documents available to petitioner and his attorneys for inspection and copying. Pet. App. 23a. The court explained that, having made the documents available to petitioner and his counsel, the government did not have any additional duty under

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[1] The district court also found that the government suppressed a second set of documents in violation of *Brady*. Pet. App. 49a-50a, 59a. The court of appeals held that the government did not have an obligation to disclose those documents, *id.* at 30a-35a, and that ruling is not at issue here.

Brady to "ferret out" defense-favorable information from those documents. *Ibid.*

Third, the court rejected as "fanciful" petitioner's claim that he had relied on the government's representation that the warehouse documents did not contain any relevant evidence. Pet. App. 26a. The court noted that, before 1996, petitioner insisted that only he could determine the relevance of the documents, and he had obtained a continuance in order to have stand-by counsel examine the documents. *Ibid.* While petitioner's second counsel stated in an affidavit that he had relied on the government's representation, the court found no genuine reliance because petitioner's second counsel could not have examined the documents in the brief period between the time he was appointed and the time of trial. *Id.* at 27a.

ARGUMENT

Petitioner contends (Pet. 9-20) that the government violated *Brady* by failing to deliver to petitioner all of the warehouse documents that were relevant to his defense. That contention is without merit. Based on the facts of this case, the court of appeals correctly determined that the government did not suppress those documents. That determination does not conflict with the decision of any other circuit or any decision of this Court. Further review is therefore not warranted.

1. In *Brady*, the Court held the "suppression by the prosecution of evidence favorable to an accused * * * violates due process where the evidence is material to guilt or punishment." 373 U.S. at 87. Thus, a critical element of a *Brady* claim is a showing that the government *suppressed* the evidence at issue. *Strickler* v.

Greene, 527 U.S. 263, 281-282 (1991). Petitioner failed to make that showing.

Three considerations support that conclusion. First, petitioner knew about the nature of the warehouse documents because they were his own documents. Pet. App. 21a-22a. Second, the government repeatedly made the warehouse documents available to petitioner and his attorneys for inspection and copying. *Id.* at 23a. And third, petitioner did not rely on the government's statements that the warehouse documents did not contain relevant evidence. *Id.* at 25a-27a. Instead, petitioner repeatedly stated that he or his counsel would examine those documents to determine their relevance to the defense. *Ibid.* In those circumstances, petitioner failed to show that there was any suppression of the documents by the prosecution.

2. Petitioner contends (Pet. 12-16) that the decision below conflicts with holdings from the Ninth, Tenth, and D.C. Circuits. But the cases from those circuits on which petitioner relies do not involve the confluence of the three considerations discussed above. And each of those circuits has reached a result consistent with the court below in circumstances that resemble more closely the circumstances here.

a. Petitioner relies (Pet. 12) on the Ninth Circuit's decision in *Gantt* v. *Roe*, 389 F.3d 908 (2004). In that case, the Ninth Circuit rejected the government's contention that it had no duty under *Brady* to disclose exculpatory information that it had uncovered in an investigation because the defendant could have uncovered the same information through a parallel investigation. The court reasoned that a defendant's failure to undertake an adequate investigation does not absolve the government of its *Brady* obligations. *Id.* at 913. The court also

emphasized that the defendant had relied on the government's representations that it was keeping the defense apprised of developments in the investigation. *Ibid.*

There is no conflict between *Gantt* and the decision below. In this case, the government did not seek to absolve itself of its *Brady* obligation by arguing that petitioner should have conducted a parallel investigation to find information he knew nothing about. Rather, the government affirmatively fulfilled its *Brady* obligation by extending to petitioner the opportunity to review petitioner's own documents. And while the defendant in *Gantt* relied on the government's representation that it would keep him apprised of developments in the investigation, petitioner did not rely on any representations by the government.

The Ninth Circuit's decision in *United States* v. *Shelton*, 588 F.2d 1242 (1978), cert. denied, 442 U.S. 909 (1979), involves circumstances that more closely resemble the circumstances here and demonstrates that the Ninth Circuit's approach accords with the approach of the court below. In that case, the defendant sought a report of an interview between the government and a bookkeeper who told investigators that he was not aware of any wrongdoing by the defendant. The government was unable to locate the report, but disclosed the bookkeeper's address to the defendant. The court held that the government had fulfilled its *Brady* obligations by supplying the defendant with the bookkeeper's address. The court explained that:

> First, Shelton knew exactly what benefit he hoped to secure from [the bookkeeper's] testimony and, therefore, had an incentive to seek him out. Second, the record supports the conclusion that [the bookkeeper] was available to the defense. * * * Under these

> circumstances, it is unreasonable to ask us to believe that the defense could not have contacted [the bookkeeper].

Id. at 1250.

Here, petitioner not only had an incentive to examine the documents at issue, he announced his intention to do so. And while the government in *Shelton* did no more than assist the defendant in locating a witness who possessed the relevant information, here the government made the very material at issue available to petitioner. Accordingly, under the analysis in *Shelton*, there was no *Brady* violation here.

More generally, the Ninth Circuit has held that "[s]ince suppression by the Government is a necessary element of a *Brady* claim, if the means of obtaining the exculpatory evidence has been provided to the defense, the *Brady* claim fails." *United States* v. *Dupuy*, 760 F.2d 1492, 1501 n.5 (1985). Because the government made the documents at issue available to petitioner, that principle is directly applicable here.[2]

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[2] The other Ninth Circuit cases cited by petitioner (Pet. 12-13) are inapposite here. In *Benn* v. *Lambert*, 283 F.3d 1040, 1060-1062 (9th Cir.), cert. denied, 537 U.S. 942 (2002), the government informed the defendant that its experts had reached a conclusion that was consistent with the government's theory, when the experts' conclusion undercut the government's theory. In *United States* v. *Howell*, 231 F.3d 615, 624-625 (9th Cir. 2000), cert. denied, 534 U.S. 831 (2001), the government failed to correct an erroneous report that incriminating evidence had been recovered from the defendant's traveling companion, rather than the defendant, and the defendant based his defense on that erroneous report. And in *United States* v. *Shaffer*, 789 F.2d 682, 690 (9th Cir. 1986), the government alerted the defendant to the existence of certain tapes, but told defense counsel that the tapes would be of no value. None of those cases involved the combination of the three circumstances involved here.

b. Petitioner's reliance (Pet. 13-14) on the Tenth Circuit's decision in *Banks* v. *Reynolds*, 54 F.3d 1508 (1995), is also misplaced. In that case, the government argued that it had no obligation to turn over information that it had arrested two other persons for the crime with which the defendant was charged, that witnesses had identified one of those persons as being at the scene of the crime, and that the other person had allegedly confessed to the crime. *Id.* at 1510-1511. The court rejected that argument, holding that "[i]n this case, the fact that defense counsel 'knew or should have known' about the * * * information * * * is irrelevant to whether the prosecution had an obligation to disclose the information." *Id.* at 1517 (citation omitted). That case stands only for the proposition that the government may not affirmatively withhold evidence based on an argument that the defendant should have known about it. The court did not address the question whether the government satisfies its *Brady* obligations when it affirmatively extends access to the relevant material to the defendant, but does not physically deliver it to him.

The Tenth Circuit addressed that question in *United States* v. *Wolf*, 839 F.2d 1387, cert. denied, 488 U.S. 923 (1988), and reached a conclusion that is fully consistent with the decision below. In that case, the government did not physically deliver tissue samples to the defendant. But the government gave the defendant a report that listed tissue samples as having been collected during the coroner's examination and asked the defendant to contact the coroner for any physical evidence needed for trial. In those circumstances, the Tenth Circuit held that the government had not suppressed the tissue samples in violation of *Brady*. The court explained that "[i]f the means of obtaining the exculpatory evidence has

been provided to the defense, * * * a *Brady* claim fails, even if the prosecution does not physically deliver the evidence requested." *Id.* at 1391.[3]

c. The D.C. Circuit decisions upon which petitioner relies (Pet. 14-15) are also inapposite here. In *In re Sealed Case No. 99-3096* (*Brady Obligations*), 185 F.3d 887 (D.C. Cir. 1999), the government argued that it had no duty to disclose a witness's cooperation agreements with local police because the defendant could have learned of those agreements by issuing a subpoena to the officers involved. The court rejected that argument on the ground that the officers were members of the prosecution team, and the appropriate way for defense counsel to obtain information from the prosecution team is to make a *Brady* request. *Id.* at 897. In *Levin* v. *Katzenbach*, 363 F.2d 287, 291 (D.C. Cir. 1966), the court held that the government had a duty to disclose an exculpatory statement from a bank officer, regardless of whether a diligent defense counsel could have discovered the same information himself. Neither of those decisions suggests that the government fails to satisfy *Brady* when, as here, it affirmatively makes the material at issue available to the defense and the material at issue consists of the defendant's own documents.

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[3] The other Tenth Circuit decisions cited by petitioner (Pet. 14) did not address the question presented here. In *United States* v. *Quintanilla*, 193 F.3d 1139, 1149 (10th Cir. 1999), cert. denied, 529 U.S. 1029 (2000), the court held that the defendant's independent knowledge of evidence that the government withheld demonstrated the absence of prejudice. In *Smith* v. *Secretary of New Mexico Department of Corrections*, 50 F.3d 801, 833 (10th Cir.), cert. denied, 516 U.S. 905 (1995), the court held that an open file policy was insufficient to satisfy the government's *Brady* obligation to disclose the existence of certain clothes when the defendant had no idea that the clothes existed.

In cases that more closely parallel the circumstances here, the D.C. Circuit has reached results consonant with the decision below. For example, in *United States* v. *Derr*, 990 F.2d 1330 (D. C. Cir. 1993), the government failed to disclose physical evidence obtained during an arrest. The court rejected the defendant's *Brady* claim on the ground that the defendant knew about the arrests and therefore of the possibility that the government had relevant physical evidence. The court explained that "*Brady* provides no refuge to defendants who have knowledge of the government's possession of possibly exculpatory information, but sit on their hands until after a guilty verdict is returned." *Id.* at 1335.

Similarly in *United States* v. *Bolden*, 514 F.2d 1301 (D.C. Cir. 1975), the government failed to disclose that it had seized blank bullets from the defendant after his arrest. The court rejected the defendant's *Brady* claim on the ground that the evidence was available to defense counsel in the government's property office where defense counsel had examined other evidence. *Id.* at 1312.

3. a. Petitioner further contends (Pet. 16-19) that the decision of the court of appeals creates a conflict with other circuits on the scope of a defendant's obligation of diligence under *Brady*. In particular, petitioner contends (Pet. 16-18) that the decision below conflicts with *McCambridge* v. *Hall*, 303 F.3d 24 (1st Cir. 2002) (en banc), and *Freeman* v. *Georgia*, 599 F.2d 65 (5th Cir. 1979), cert. denied, 444 U.S. 1013 (1980). According to petitioner, those decisions hold that the government necessarily violates *Brady* when it makes a misleading statement about exculpatory information. Petitioner's understanding of those decisions is mistaken.

In *McCambridge*, the en banc majority did not address that question. Instead, it assumed arguendo that

the government should have disclosed the information at issue, and concluded that there was no prejudice from the failure to disclose. 303 F.3d at 37. Petitioner's discussion of the case (Pet. 17) is drawn entirely from the dissent, and even the dissent did not suggest that a misstatement by the government about the nature of the material at issue would result in a *Brady* violation in circumstances like those presented here. 303 F.3d at 48 (noting that "[t]his was not a case where the defense simply refused to look for evidence it knew existed").

In *Freeman*, a police officer deliberately concealed from the defense an eyewitness who possessed exculpatory information. The Fifth Circuit rejected the government's argument that its concealment of the witness did not violate due process because the defendant failed to look for the witness. The court reasoned that the government had misled the defendant into believing that the witness would give unfavorable testimony, and the defendant could not have located the witness in any event. 599 F.2d at 71-72. Nothing in *Freeman* suggests that the government violates *Brady* when it affirmatively makes the material at issue available to the defendant, that material consists of the defendant's own records, and the defendant has not relied on the government's statements about the relevance of the material.

b. Nor is petitioner assisted (Pet. 18-19) by *United States* v. *Payne*, 63 F.3d 1200 (2d Cir. 1995), cert. denied, 516 U.S. 1165 (1996), or *United States* v. *Ellis*, 121 F.3d 908 (4th Cir. 1997), cert. denied, 522 U.S. 1068 (1998). In *Payne*, the court rejected the government's argument that its failure to turn over an exculpatory document did not violate *Brady* because the defendant could have found the affidavit in a public file. The court explained that the defendant's counsel was not aware of

any facts that would have required him to discover the affidavit. 63 F.3d at 1209. The court added that the government had provided the defendant with other similar documents and defense counsel could reasonably assume that court files did not include other exculpatory material. *Ibid.*

This case is different in every relevant respect. The government did not expect petitioner to search for unspecified documents contained in a public file; it extended petitioner the opportunity to review the specific documents at issue. Nor was petitioner unaware of the possible relevance of the material at issue; they were his own documents. And while the government supplied petitioner with some documents from the warehouse, petitioner did not assume that other exculpatory information did not exist. To the contrary, he repeatedly insisted that only he could determine that.

In *Ellis*, the court rejected the government's argument that it was excused from turning over FBI 302 reports that contained exculpatory evidence because the defendant failed to exercise due diligence in requesting the documents. The court explained that the defendant had obtained a court order directing the government to produce all *Brady* material, the government turned over some FBI 302 reports, but not the reports at issue, and that the government assured the defendant that it had turned over all exculpatory information. 121 F.3d at 914.

This case is entirely different. *Ellis* concerned reports to which only the government had access; in this case, the government offered petitioner access to the documents at issue. In *Ellis*, the defendant had no reason to know about the other 302 reports. Here, petitioner had reason to know about the possible relevance

of the remaining warehouse documents. In *Ellis*, the defendant reasonably relied on the government's assurance that there were no other exculpatory 302 reports. Here, petitioner did not rely on the government's statements that there were no other relevant documents.

c. Petitioner's reliance (Pet. 19) on *Leka* v. *Portuondo*, 257 F.3d 89 (2d Cir. 2001), and *United States* v. *Kelly*, 35 F.3d 929 (4th Cir. 1994), is also misplaced. In *Leka*, the government failed to disclose the name of a police witness who possessed exculpatory information until the eve of trial. The court held that the government's disclosure was "too little, too late," because the defendant had no basis for knowing about the witness before it began pretrial preparations and a defendant does not have sufficient time for investigation once trial begins. 257 F.3d at 100. In *Kelly*, the court held that the government's failure to disclose exculpatory material could not be excused based on defendant's failure to find the information from an alternative source, because the defendant could not have found the information in time to use it at trial. 35 F.3d at 937. In this case, by contrast, petitioner had the opportunity to review the documents at issue 21 months before trial.

4. Finally, petitioner errs in contending (Pet. 20-28) that the decision below conflicts with *Strickler* v. *Green*, 527 U.S. 263 (1999), and *Banks* v. *Dretke*, 540 U.S. 668 (2004). In both *Strickler* and *Banks*, the prosecution represented that it had made all exculpatory information available through "open file" discovery, when, in fact, the relevant documents were not included. In both cases, the Court concluded that the defendant was entitled to rely on the representation that all *Brady* material has been disclosed without further efforts to obtain

the material. *Strickler*, 527 U.S. at 283 n.23; *Banks*, 540 U.S. at 693-694.

Here, in contrast, the government's "open files" contained the alleged *Brady* material, but petitioner never took advantage of the opportunity to review those files. Moreover, unlike the defendants in *Strickler* and *Banks*, petitioner did not rely on the government's representations about the nature of the documents. Indeed, the court of appeals characterized as "fanciful" petitioner's claim of reliance, because he sought and obtained continuances to review the documents after the government made the statements. Pet. App. 26a.[4]

As petitioner notes (Pet. 24), the court of appeals further distinguished *Strickler* and *Banks* on the ground that the government acted in good faith in this case. The court of appeals ultimately recognized, however, that the resolution of the question presented depended on whether the government had suppressed the evidence at issue, not on whether the government acted in good or bad faith. Pet. App. 17a. And for the reasons discussed, the court correctly determined that, on the facts of this case, the government did not suppress the

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[4] Petitioner challenges (Pet. 24-25 & n.8) the court of appeals' finding that there was no reliance, but that finding is amply supported by the record. See Pet. App. 25a-27a. Petitioner barely contests (Pet. 25 n.8) the court's finding that there was no reliance before petitioner convinced the district court to appoint a second trial counsel on the eve of trial. Instead, petitioner asserts (Pet. 24-25) that second trial counsel relied on the government's representations. But as the court of appeals explained, the district court appointed that counsel only on the condition that his appointment would not delay trial and there was no realistic possibility that the massive warehouse documents could have been examined during the two weeks that petitioner gave his second counsel to prepare for trial. Pet. App. 26a-27a. In any event, that fact-bound question does not warrant review.

evidence. Instead, it made the evidence available, satisfying its obligation under *Brady*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 05-244

IN THE

Supreme Court of the United States

Leonard A. Pelullo,
Petitioner,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

There is no dispute that prosecutors grossly misrepresented to the district court and to petitioner the availability of an array of material subject to disclosure under *Brady* v. *Maryland*, 373 U.S. 83 (1963). The district judge "recall[ed] *time and time again*, [the government] assuring the defense and me that you had gotten all the relevant documents from the Florida warehouse." C.A. J.A. 3930 (emphasis added). There is also no dispute that the documents were so central to the case and the credibility of the government's witnesses that a retrial was required. The district court found that the "mass of documentary and other evidence" in question "seriously undermine[d] the testimony of a number of the Government witnesses," requiring a retrial. *Id.* 3998. The Third Circuit nonetheless held that prosecutors were free to flout their profound duty to represent honestly the state of the disclosures required by *Brady* (see, *e.g.*, *Banks* v. *Dretke*, 540 U.S. 668, 693-98 (2004); *Strickler* v. *Greene*, 527 U.S. 263, 283-84 & n.23 (1999)) so long as the defendant could have uncovered the truth through a diligent investigation, "even when there might be some showing of governmental impropriety." Pet. App. 29a. That holding conflicts with decisions of this Court and other court of appeals and warrants certiorari.[1]

I. The Questions Presented Merit Certiorari.

1. The government's brief in opposition is most notable for the fact that it does not deny that the questions presented

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[1] This Court's decisions cannot be distinguished on the ground that "the government's 'open files' contained the alleged *Brady* material, but petitioner never took advantage of the opportunity to review those files." Contra BIO 19. The government cannot seriously argue that it violates due process to falsely state that an open file contains *everything* relevant (as in *Strickler* and *Banks*) but that it comports with the Constitution to falsely state that the open file contains *nothing* relevant (as in this case).

by the petition are the subject of square and recurring circuit conflicts. The Third Circuit's holding that a *Brady* violation is excused if the defendant fails to exercise "due diligence" (Pet. App. 4a) is directly contrary to decisions of other circuits (see Pet. 12-16). The government's brief below recognized the conflict. See *id.* 11 (citing Gov't C.A. Reply Br. 31 n.27). Indeed, this Court granted certiorari to resolve the conflict in *Strickler* v. *Green*, 527 U.S. 263 (1999), but ultimately did not decide the issue. See Pet. 11. The conflict arises from entire bodies of settled case law in other circuits. See *id.* 12-13 (four Ninth Circuit decisions), 13-14 (four Tenth Circuit decisions). In addition, even circuits that generally apply a due diligence exception to *Brady* nonetheless refuse to do so when, as in this case, (a) the government misleads the defendant about the availability of evidence (*id.* 16-18), (b) prosecutors make limited disclosures that create the impression that disclosure has been complete (*id.* 18-19), or (c) the evidence only becomes relevant at trial (*id.* 19).[2]

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[2] In addition to the cases cited in the petition, the Eleventh Circuit has recently made clear that its due diligence exception applies only when the government makes "no false or misleading statements regarding what that evidence might show or where it might be found." *Maharaj* v. *Secretary, Dep't of Corr.*, 2005 U.S. App. LEXIS 27418, at *51 (CA11 Dec. 15, 2005) (citing *Banks*, *supra*).

The cases cited by the government as supposedly "more closely resembl[ing] the circumstances here" (BIO 11) are easily distinguished. The very fact that the government claims that these precedents are the most analogous decisions supporting the Third Circuit's extreme position is itself a strong testament to how insupportable that position is. Among other things, none of those decisions – in contrast to those cited by the petition – involves the most critical fact of this case: false statements by prosecutors about whether the government has made a full disclosure under *Brady*. In *United States* v. *Shelton*, 588 F.2d 1242 (CA9 1978), cert. denied, 442 U.S. 909 (1979) (BIO 11-12), the government was unable to locate a report of a witness interview that it had been ordered to

The government also does not dispute the significance of the issue, which is outcome determinative in numerous cases.[3] It is also central to the orderly functioning of the criminal justice system. This Court has repeatedly recognized "the special role played by the American prosecutor in the search for truth in criminal trials." *Strickler*, 527 U.S. at 281. District courts and defendants constantly rely on the government's representation that "it is unaware of any *Brady* material in this case, that it is aware of its continuing obligations under *Brady* and that, if such material is discovered in the future, it will provide timely disclosure of that material" (*e.g.*, *United States* v. *Watts*, 2005 U.S. Dist. LEXIS 24638, at *13-*14 (S.D.N.Y. Oct. 21, 2005)) to allow the defendant to allocate scarce resources in developing his defense without bombarding the

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disclose; the court found no *Brady* violation because the government as a substitute ensured that the defendant could contact the witness. *United States* v. *Wolf*, 839 F.2d 1387, cert. denied, 488 U.S. 923 (1988) (BIO 13-14), similarly held that the government complied with *Brady* when it provided a report on evidence and offered to make the evidence available. In *United States* v. *Derr*, 990 F.2d 1330 (CADC 1993) (BIO 15), the critical fact for the court of appeals – which the government neglects to mention – is that the defendant *did not* request the disclosure. *United States* v. *Bolden*, 514 F.2d 1301 (CADC 1975) (BIO 15), found as a matter of fact that there was no prejudice from the failure to disclose evidence; indeed, the defendant's lawyer had not claimed otherwise.

[3] For examples subsequent to the filing of the petition for certiorari, compare *Atkins* v. *County of Riverside*, 2005 U.S. App. LEXIS 19928, at *6 n.2 (CA9 Sept. 14, 2005) ("reject[ing]" the government's "argument that mere access on the part of the defendant" to the evidence in question "absolved the government of any *Brady* duty of disclosure" because the defendant was entitled to rely on the government's representations (citing *Gantt* v. *Roe*, 389 F.3d 908 (CA9 2004)) with *Ienco* v. *Angarone*, 429 F.3d 680, 2005 U.S. App. LEXIS 24467, at *7 (CA7 Nov. 14, 2005), and *LeCroy* v. *Secretary, Fla. Dep't of Corr.*, 421 F.3d 1237, 1268 (CA11 2005).

government and the court with repeated demands for disclosure. The decision below calls that consistent practice squarely into question and, if allowed to stand, would have a substantial adverse effect upon federal criminal practice. See Pet. 21-22.[4]

II. The Government's Arguments Lack Merit.

A. This Court Would Resolve The Conflict Over A Due Diligence Exception To *Brady* In This Case.

The government's principal argument, at bottom, is that this is not an appropriate vehicle for resolving the questions presented. That argument is unfounded. If this Court granted certiorari, it plainly would resolve the circuit conflict over whether there is a due diligence exception to *Brady*. The legal question was not only presented and decided by the Third Circuit, but it was the premise of the court of appeals' legal conclusion that petitioner had a "due diligence" obligation to investigate the Florida documents himself. See Pet. 8; Pet. App. 4a, 22a n.13, 24a, 27a, 28a, 30a, 35a n.24. It is true that the court went on to examine the underlying facts of this case, as must every court deciding a *Brady* challenge. But those factual determinations have no bearing on whether the Third Circuit's legal construction of the *Brady* obligation was cor-

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[4] The government describes the petition as supposedly presenting the question whether "the government [was required to] physically deliver the [*Brady*] material to petitioner" (BIO i) and begins its argument by asserting that "[p]etitioner contends (Pet. 9-20) that the government violated *Brady* by failing to deliver to petitioner all of the warehouse documents that were relevant to his defense" (BIO 9). See also *id.* 13 (attempting to distinguish conflict with *Banks* v. *Dretke*, 54 F.3d 1508 (CA10 1995), on the sole ground that *Banks* did not involve a claim that the government did "not physically deliver [the *Brady*] material"). Petitioner obviously does not claim that the government is required to "physically deliver" documents; rather, the government may not lie about whether it possesses documents the defendant is entitled to inspect.

rect. For example, absent a "due diligence" exception, it was the government's duty to disclose the documents, and it makes no difference whether the government is correct that petitioner did not rely on the prosecutors' false statements.

In addition, the government's claimed factual distinctions do not apply to a critical piece of exculpatory evidence that the district court found material. As the petition explained, the government failed to disclose a significant handwriting report, which the district court found "was a pretty persuasive piece of evidence" (C.A. J.A. 3936) that "would have cast doubt upon important testimony of a key witness" (Pet. App. 67a) and in fact "tend[ed] to show that [the witness] lied at trial" (*id.* 66a). None of the government's objections to the case as a vehicle for deciding the basic "due diligence" question apply to this central piece of evidence. The report was not created by petitioner or his companies; it was not among the Florida files; and it was not a document that the government purportedly had offered to disclose to petitioner. The prosecutor did not provide the report to petitioner notwithstanding that he "was aware of" it. C.A. J.A. 3937. As the government frankly acknowledged in its brief below, the *only* basis on which the government's failure to disclose the document can be sustained is the Third Circuit's settled rule – which other circuits reject – that petitioner had a "due diligence" obligation to uncover the document himself through other litigation. Pet. 28 n.9 (quoting Gov't C.A. Br. 65-66).

B. The Government's False Statements On The Eve Of Trial Could Only Be Excused On A "Due Diligence" Theory.

The government's vehicle arguments also lack merit because they do not respond to petitioner's central claim that the government violated *Brady* through its false statements on the eve of trial. As explained in the petition (at 4, 5-7), the government's trial strategy was to focus on particular transactions relating to Compton Press that underlay the supposed "three embezzlement schemes" (BIO 2), alleging that each was in-

fected with fraud. The transactions were not identified in the indictment, however. As a consequence, at the time of the trial, only the government – not petitioner – knew the false trial testimony the government's witnesses would offer, and petitioner had no way of knowing what types of documents would impeach that testimony. For example, the government does not dispute that its witnesses offered flatly false testimony about whether petitioner had provided a particular "bridge loan" and whether a particular meeting had occurred. See Pet. 5-6. Prior to trial, even if petitioner had reviewed the Florida documents in detail, it would have been absolutely impossible for him to predict the witnesses' testimony and secure the relevant documents demonstrating that the testimony was false. Indeed, the brief in opposition does not contend otherwise.

It is thus dispositive that, on the eve of trial, prosecutors stated that they had been "assured" that there were "no documents" in Florida that were relevant and that petitioner's counsel "*should not bother to go* to Jacksonville." Pet. App. 15a (emphasis added). Prosecutors then assured the court and petitioner that they were conducting "an exhaustive search" (C.A. J.A. 385) and subsequently confirmed that "[t]he United States is not aware of any additional * * * *Brady* or *Giglio* material" (*id.* 4040-41). See Pet. 3. The government thus now admits that, on the eve of trial, prosecutors responded to a statement by petitioner's counsel that he sought to review the documents by stating "that the Florida prosecutor had assured [them] that there were *no documents* in Florida pertaining to Compton Press or to the charges against petitioner." BIO 6-7 (emphasis added). The government moreover "confirm[ed] that it had provided *all materials* subject to disclosure." *Id.* 7 (emphasis added). Such gross misrepresentations – which, the district court found, caused the jury not to hear significant evidence that required a new trial – go to the heart of the *Brady* obligation.

The government's only response to petitioner's constitutional claim is to repeat the court of appeals' conclusory

statement that, as of the time the trial commenced, it would have been too late to review the documents. The theory is that, although the district court found that petitioner's counsel "relied on the government's representation, [there could be no] genuine reliance because petitioner's second counsel could not have examined the documents in the brief period between the time he was appointed and the time of trial." BIO 9. But the government's use of the term "genuine reliance" is of course completely inapt, for its point has nothing to do with "reliance" and everything to do with the assertion that, although petitioner's counsel did rely, it would have been too late to review the evidence if the government (contrary to its practice throughout the case) had actually told the truth. In fact, petitioner's trial counsel submitted an uncontradicted, sworn affidavit – credited by the district court – that were it not for the government's false representations, once the government put on its testimony he would have arranged for someone to review the Florida documents for impeaching and exonerating evidence. In turn, the government acknowledges that the district court – *the same judge who tried the case* – found as a matter of fact "that the petitioner and his counsel reasonably relied on the government's representations that there were no relevant documents in the Florida warehouse." BIO 8. The Third Circuit itself emphasized "the ease" with which petitioner's counsel located the documents immediately after trial (Pet. App. 28a), and they would have been uncovered with the very same "ease" during the trial because the body of documents responsive to the testimony was quite small. There is no basis for overturning the trial court's findings of reliance and prejudice, which manifestly are not "clear error."

The Third Circuit's holding moreover gives rise to a significant legal conflict with decisions of this Court and other circuits, which hold that the government has ongoing *Brady* and *Giglio* obligations during trial and through sentencing. See Pet. 26. *Banks* itself involved the government's *Brady* representations "on the eve of trial." 540 U.S. at 693. The

Third Circuit's decision as a practical matter nullifies those obligations, as it pointed to nothing remarkable about this case that made defense counsel uniquely unable to review the limited universe of materials that became relevant during the trial proceedings.

This case accordingly squarely presents the circuit conflict over whether there is a "due diligence" exception to *Brady*.[5]

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[5] With respect to the period *prior* to its representations on the eve of trial, the government emphasizes that petitioner indicated a desire to review the documents. BIO 4. The district court properly found that this claim "ignores the reality of the situation." Pet. App. 59a. The government acknowledges – as it must – that petitioner subsequently instead asked the government to disclose all exculpatory evidence from the Florida warehouse and that prosecutors represented – falsely – that the six boxes previously disclosed "represent[ed] *all*" of the relevant documents from Florida. *Id.* 5. Petitioner's determination not to pursue the matter further in light of the government's representations was perfectly reasonable. The burden manifestly was not on petitioner given the prosecutors' statements: "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Banks*, 540 U.S. at 695. This Court has thus firmly rejected the assertion that "the prosecutor can lie and conceal and the prisoner still has the burden to * * * discover the evidence." *Id.* at 696 (alteration in original).

In addition, the government acknowledges that the most that petitioner indicated was that he "needed to review the documents to identify those pertinent to the defense case" (BIO 4 (Dec. 1994)) and to identify "what he would need to defend himself" (*id.* 5 (Mar. 1995)). That is a very different matter from reviewing the Florida documents to uncover evidence that impeached the testimony of the government's witnesses, of which petitioner was of course unaware before trial. See Part II-B, *supra*.

The government finally states that petitioner "asked for a continuance of several months to obtain the documents and review them." BIO 5-6. That assertion is contrary to the record and sub-

C. The Government's Remaining Arguments Lack Merit.

The remaining factual distinctions raised by the government were addressed by the petition. Beyond its claim that petitioner did not rely on the government's false statements that the Florida documents it withheld did not contain any *Brady* materials (addressed in Part II-B, *supra*), the government describes the Florida warehouse as containing petitioner's "own" documents (BIO 10). But that is quite misleading, insofar as the government is suggesting either that its *Brady* obligations are reduced when it withholds the defendant's own documents or that petitioner should have known their contents. The fact that "petitioner knew about *the nature* of the warehouse documents" in the sense that he knew that some related to Compton Press (*id.* 10 (emphasis added)) does not diminish the government's obligations under *Brady*. The irreducible logic of the government's contrary position is that whenever a defendant is aware of the general contours of available materials possessed by the prosecution – to take a simple and recurring example, witness interview reports – the government has a license to lie about their contents. As the opposition admits, these were not petitioner's *personal* documents, but "business records of 25 of petitioner's companies" (*id.* 3), which employed thousands of employees. The government's assertion is akin to the implausible claim that it does not violate *Brady* if it seizes, withholds, and lies about the corporate files of a massive consulting company. *Cf. Ar-*

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stantially misleading. The district court properly recognized that for most of this period petitioner "was in jail and obviously could not have made his own examination." Pet. App. 60a. The most that even the court of appeals said is that petitioner sought a continuance for *several* reasons, one of which was to review documents, see *id.* 13a, and the record moreover does not establish that the documents included those in the Florida warehouse, see C.A. J.A. 3838-39, 3845-46.